

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 11, 2006 appellant, then a 35-year-old supervisory transportation security screener, filed a traumatic injury claim alleging that she injured her shoulders and back while lifting a bag in the performance of duty on August 5, 2006. OWCP accepted her claim for sprain of the lumbar back and neck sprain on November 3, 2006. Appellant's attending physician released her to return to full duty on October 16, 2006. By decision dated January 9, 2007, OWCP denied appellant's claim for compensation for the period September 12 through October 14, 2006.

OWCP accepted the additional condition of sacroiliitis and disorders of the sacrum on July 20, 2007. Appellant returned to full-time light-duty work on October 14, 2007 but Dr. Dian Eisinger, a Board-certified orthopedic surgeon, found that appellant was totally disabled beginning November 8, 2007. She was placed on the periodic rolls on November 28, 2007. Appellant requested approval for sacroiliac joint fusion on the left on December 12, 2007. On May 7, 2009 OWCP noted the accepted conditions of sacroiliitis and sacroiliac arthritis and authorized fusion of the sacroiliac joint.

On August 6, 2009 appellant underwent left sacroiliac arthrodesis with iliac crest bone grafting and internal fixation. In a note dated January 13, 2010, Dr. Eisinger noted appellant's reports of left-sided back pain. On examination she found tenderness in the sciatic notch and markedly positive straight leg raising on the left with giveaway weakness due to pain. Dr. Eisinger diagnosed possible discogenic left radicular back pain. She examined appellant on February 4, 2010 and diagnosed chronic left radicular low back pain with severely antalgic gait and markedly positive straight leg raise on the left and tenderness in the left sciatic notch. Appellant underwent a left L5-S1 interlaminar epidural steroid injection on February 22, 2010.

This procedure did not reduce her pain. Appellant underwent a magnetic resonance imaging (MRI) scan on March 31, 2010 which demonstrated unchanged mild degenerative facet changes in the lower lumbar spine. Dr. Eisinger found that appellant was totally disabled from March 25, 2010. On May 5, 2010 she noted that appellant had developed right interscapular pain which was "probably related to her cane use and therefore related to the sacroiliac joint...."

Dr. Ralph A. Liebelt, a Board-certified orthopedic surgeon, examined appellant on May 12, 2010 and reviewed her MRI scan. He stated that appellant's examination showed questionable pain behaviors, but no motor or sensory deficits. Dr. Liebelt diagnosed back and leg pain of uncertain etiology. On July 20, 2010 Dr. Eisinger continued to find appellant totally disabled. Appellant underwent an additional MRI scan on August 3, 2010 which was not substantively changed from her prior study. Dr. Eisinger reviewed these results on August 24, 2010 and noted that appellant had left greater than right facet changes at L3-4 and L5-S1. She noted that appellant reported pain on extension and standing which was consistent with left facet pain. Dr. Eisinger found tenderness over the lower lumbar facets with moderately restricted flexion and severely restricted extension. She stated, "Suspect significant facet component to back pain." Dr. Eisinger performed a lumbar facet injection on October 4, 2010. On October 14, 2010 appellant stated that she had no relief from the injection. Dr. Eisinger performed an electromyogram (EMG) on December 14, 2010 and found a normal study. She stated, "At this

point we are not really finding the cause of her continued severe back and left leg pain which has been totally disabling for her.”

OWCP referred appellant for a second opinion evaluation on January 6, 2011. Dr. Edward R. Mulcahy, a Board-certified orthopedic surgeon, completed a report on January 25, 2011. He found a slight antalgic gait favoring the left leg, no paravertebral muscle spasm and slight pain with palpation around the left sacroiliac joint. Dr. Mulcahy found limited range of motion of the lumbar spine with cogwheel motion and no atrophy of the lower extremity, no major muscle weakness and equal deep tendon reflexes. He determined that appellant had no objective findings and stated that the loss of range of motion of the lumbar spine was self-limiting and an overreaction to the examination maneuvers. Dr. Mulcahy stated that appellant’s cervical and lumbar strains had resolved, that fibromyalgia and chronic pain syndrome were not related to her accepted employment injuries and noted her sacroiliac joint fusion. He stated, “The accepted injuries including the cervical and lumbar strains as well as the concurrent medical condition of sacroiliitis have totally resolved.” Dr. Mulcahy further stated that the physical limitations that appellant was experiencing were not due to the work injury, based on the lack of objective physical findings, inconsistent history and inconsistent anatomical nature of her complaints as well as lack of significant findings on diagnostic testing. He concluded that appellant’s perceived limitations were due to nonwork-related psychological issues. Dr. Mulcahy found that she was capable of performing her date-of-injury position.

Dr. Eisinger examined appellant on February 8, 2011 and noted that appellant described refractory back pain with increasing left radicular pain with no clear cause. She found that appellant’s gait was severely antalgic on the left with tenderness in the left buttock and sacroiliac area. Dr. Eisinger noted very restricted lumbar flexion and extension and diagnosed refractory back pain.

Dr. Eisinger reviewed Dr. Mulcahy’s report on March 23, 2011 and opined that appellant had work restrictions due to her sacroiliac joint fusion including lifting, bending and prolonged standing. She noted objective findings including the prior sacroiliac joint fusion, significant spasm and restricted flexion and extension. Dr. Eisinger disagreed that appellant had only psychological issues even though she was unable to determine the cause of appellant’s back pain.

On July 26, 2011 OWCP referred appellant, together with a statement of accepted facts and list of specific questions, for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a), with Dr. Donald Getz, a Board-certified orthopedic surgeon. The statement of accepted facts lists the accepted conditions as cervical and lumbar strain as well as sacroiliitis.² In his August 15, 2011 report, Dr. Getz described appellant’s history of injury and medical treatment. He examined appellant and found no cervical spine symptoms with full range of motion and no tenderness. Dr. Getz found that appellant’s lumbar spine examination demonstrated that she leaned to the right side while sitting and walked with a left leg limp. He noted that she had mild tenderness over the low back primarily in the buttocks with exquisite

² The statement of accepted facts dated September 10, 2008 did not include disorders of the sacrum and sacroiliac arthritis or the authorized fusion of the sacroiliac joint. All of which were accepted by OWCP as due to appellant’s accepted employment injury of August 5, 2006

tenderness overlying the bilateral trochanters. Dr. Getz diagnosed bilateral trochanteric bursitis, early right sacroiliitis and resolved cervical and lumbar sprains as well as chronic pain syndrome.

Dr. Getz opined that the accepted conditions of cervical and lumbar strain were no longer present or disabling. He stated, "The work injury has now totally resolved and the claimant's continuing complaints are the results of her unrelated conditions of chronic pain syndrome, bilateral sacroiliitis, exogenous obesity, bilateral trochanteric bursitis and fibromyalgia." Dr. Getz opined that appellant did not have any restrictions or limitations as a result of the conditions of cervical and lumbar strain. In regard to the accepted condition of sacroiliitis, he stated:

"This in my opinion, preexisted the incident of August 5, 2006 and was only incidentally discovered during an overall work up of the claimant's low back pain. The sacroiliac joint condition was not caused by the incident of August 5, 2006. While the sacroiliac joint may be traumatically injured its construction is sufficiently rigid and protected by extremely strong ligamentous structures that it cannot be damaged merely by the lifting of a suitcase. Traumatic injuries do occur to the sacroiliac joint but only after significant trauma such as a crush pelvis or associated with major fractures. The claimant's sacroiliac condition is either inflammatory or degenerative and may explain the claimant's painful symptoms in the area that preceded the incident of August 5, 2006 that were interpreted as part of her fibromyalgia. This opinion is further supported by the developing bilaterality of the condition."

Dr. Getz concluded that appellant was not currently disabled from any work due to the conditions accepted as resulting from her August 5, 2006 employment incident.

In a letter dated February 2, 2012, OWCP proposed to terminate appellant's medical and compensation benefits for the accepted conditions of cervical sprain, lumbar sprain and sacroiliitis based on Dr. Getz' report. It allowed appellant 30 days for a response. Appellant disagreed on February 10, 2012. She stated that, although her neck and back sprains had resolved, she continued to have symptoms and residuals due to her accepted condition of sacroiliitis.

On February 8, 2012 Dr. Eisinger diagnosed right sacroiliitis in a patient with a previous left joint fusion. Dr. Liebelt examined appellant on February 22, 2012 and diagnosed healed/healing left joint arthrodesis with increasing pain on the right. He opined that appellant's right hip symptoms had been present since her injury.

By decision dated March 26, 2012, OWCP terminated appellant's compensation benefits effective March 26, 2012 based on Dr. Getz' report. Counsel requested an oral hearing before an OWCP hearing representative on April 5, 2012. Appellant testified at the oral hearing on July 11, 2012. By decision dated September 24, 2012, the hearing representative found that Dr. Getz' opinion was based on a complete and accurate factual and medical background and constituted the weight of the medical opinion evidence. She found that this report established that appellant's injury-related residuals and disability had resolved.

Appellant requested reconsideration on October 1, 2012 and submitted an additional report from Dr. Liebelt dated July 25, 2012. By decision dated November 6, 2012, OWCP reviewed the merits of appellant's claim and denied modification of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁵ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁶

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.⁷ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁸

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁹

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for cervical and lumbar sprain as well as sacroiliitis, disorders of the sacrum and sacroiliac arthritis as well as fusion of the sacroiliac joint. It subsequently developed the medical evidence and determined that a conflict in medical opinion existed between Dr. Eisinger, appellant's treating physician, who opined that appellant had residuals of her sacroiliitis and resulting surgery and was partially disabled, and Dr. Mulcahy,

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ *Id.*

⁵ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁶ *Id.*

⁷ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

⁸ *R.C.*, 58 ECAB 238 (2006).

⁹ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

OWCP's second opinion physician, who opined that she had no work-related residuals and disability. Consequently, OWCP properly referred appellant to Dr. Getz to resolve the medical conflict.

The Board finds that Dr. Getz' report is not sufficiently well reasoned to resolve the medical conflict. Regarding appellant's accepted sacroiliitis, Dr. Getz opined that this condition was not related to the work injury of August 5, 2006. However, her condition was accepted by OWCP for sacroiliitis and this was reflected on the statement of accepted facts provided to Dr. Getz. The Board finds that Dr. Getz' report is of diminished probative value, as his opinion disregarded a critical element of the statement of accepted facts. The Board notes that it is the function of the medical expert to give an opinion only on medical questions, not to find facts.¹⁰ Furthermore, to be given special weight, the opinion of an impartial medical specialist must be based on a proper factual background. As Dr. Getz did not give due regard to the statement of accepted facts, his opinion was not based on a proper factual background.

Consequently, the Board finds that there is an unresolved conflict in the medical evidence regarding whether appellant continues to have disability or residuals attributable to her accepted emotional condition. Therefore, OWCP did not meet its burden of proof to terminate her compensation benefits.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

¹⁰ *S.J.*, Docket No. 09-1355 (issued May 20, 2010); *Paul King*, 54 ECAB 356 (2003).

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 15, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board